



U.S. Citizenship
and Immigration
Services

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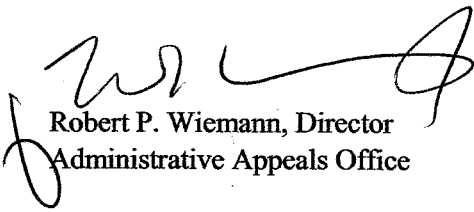
FILE: SRC 02 248 50734 Office: TEXAS SERVICE CENTER Date: **AUG 10 2004**

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

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invasion of personal privacy

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Georgia and claims to be a retail store and investment operation. The petitioner states that it is a subsidiary of M/s Swastik Rice Mills, located in India. The beneficiary was initially granted a one-year period of stay to open a new office in the United States. The petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity. On appeal, the petitioner disputes the director's findings.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii) a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

At issue in this proceeding is whether the petitioner has established that the beneficiary would be employed in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a statement appended to the petition, the petitioner provided the following description of the beneficiary's role with the petitioning organization:

[The beneficiary's] skills in nurturing the Indian operation and negotiating U.S. proposals are needed to complete our negotiations, investments and management of the U.S. operations in which he will continue to serve as Chief Executive Officer. Once our investment has been finalized: [sic] his duties will include supervision of all financial and administrative operations for the company, over which he will exercise complete discretionary authority. Ultimately, it will be his responsibility to establish [the petitioner] on a sound financial footing. He will recruit and train the staff and have hiring and firing authority over them.

Additionally, he will use his marketing skills to develop and execute the company's marketing strategies, including advertising campaigns and company promotions.

On January 15, 2003, the director denied the petition concluding that the beneficiary would be employed as a first-line supervisor whose primary responsibility would be to supervise non-professional employees.

On appeal, counsel disputes the director's findings stating that the beneficiary made a number of business contacts with sellers and developers even though such contacts failed to result in complete business transactions. Counsel also claimed that the beneficiary would perform the following list of duties under the extended petition:

- Major decision making for [the] [p]etitioner relating to financing, marketing, personnel and advertising
- Identify and negotiate contracts for purchase of stores, contact brokers for information on stores or contact owners
- Obtain all funds for the purchase of stores
- Execute all contracts on behalf of [the] [p]etitioner
- Develops expansion plans
- Obtains all licenses, permits and renewals
- Hires, fires and reviews performance of employees

Counsel states that the beneficiary was performing all of the above functions at the time the petition was filed and claims that the beneficiary was the petitioner's only employee at that time. While such a personnel structure suggests that the beneficiary was likely to have been at the top of the petitioner's organizational hierarchy, it must be noted that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Although the petitioner's description of the job duties is key to determining whether the beneficiary primarily performs qualifying duties, in the instant case the petitioner readily acknowledges that at the time the petition was filed the beneficiary was its sole employee. Thus, regardless of what the job description may suggest about the nature of the beneficiary's job duties, the fact that the petitioner employed no one but the beneficiary strongly suggests that the beneficiary was performing all of the petitioner's functions, qualifying or not, as there simply were no other employees to take over the non-qualifying duties.

Upon review of the record, the AAO concludes that the petitioner has failed to progress beyond the start-up stage of development within its first year of operation. There is no evidence that as of the date of the filing of the petition the petitioner had hired or contracted a support staff to relieve the beneficiary from having to engage in non-qualifying duties. Although counsel stresses the beneficiary's high degree of discretionary authority, the record lacks sufficient evidence to establish that the beneficiary would primarily perform tasks of a managerial or executive nature. Despite indications of future hires, the petitioner must establish

eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Based on the evidence furnished, it cannot be found that the beneficiary would be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the record lacks sufficient evidence to indicate that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States as mandated by 8 C.F.R. § 214.2(l)(14)(ii)(B). See 8 C.F.R. § 214.2(l)(1)(ii)(H). In support of the petition, the petitioner provided a description of the duties the beneficiary would perform "once [the petitioner's] investment has been finalized" and stated that the beneficiary has made genuine effort to "secure a good deal for the company." However, regardless of the beneficiary's effort, the mere fact that the beneficiary's primary focus during the petitioner's first year of operation was to secure a business investment indicates that the petitioner was not ready to start doing business upon the beneficiary's arrival in the United States. Therefore, the AAO cannot conclude that the petitioner was doing business for the year prior to filing the petition to extend the period of the beneficiary's authorized employment. It is noted that an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). As such, due to the additional grounds discussed above, this petition cannot be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.